RECENT AMERICAN DECISIONS.

Supreme Court of Rhode Island.

MARY O'RORKE *v.* MARY SMITH.

M. C. owning a tract of land bounded N. by a street, conveyed to D. the west portion, whereon was a well, reserving a right to use the well by the words "excepting a privilege to the well of water on said lot which I reserve for the use of my said homestead estate," this homestead estate being the remainder of the tract. Subsequently M. C. devised to J. in fee simple the land between the house and the lot conveyed to D., together with a tenement in the house, and to S. the rest of the homestead estate. For a long period, but not for the time required to gain an easement by prescription, all the occupants of the homestead estate had crossed the land between the homestead and D.'s lot on their way to the well. In trespass *quare clausum* brought by the grantees of J. against S., *held*, that the way across J.'s lot could not be claimed as a way of strict necessity. *Held*, further, that the way could not be implied from the circumstances of the case as one reasonably necessary.

Query. Whether the grant of a way existing *de facto* can be implied except in cases of strict necessity.

Semble, that the claimant of such grant must be required to show that without the way he will be subjected to an expense excessive and disproportioned to the value of his estate, or that his estate clearly depends for its appropriate enjoyment on the way, or that some conclusive indication of his grantor's intention exists in the circumstances of his estate.

EXCEPTIONS to the Court of Common Pleas.

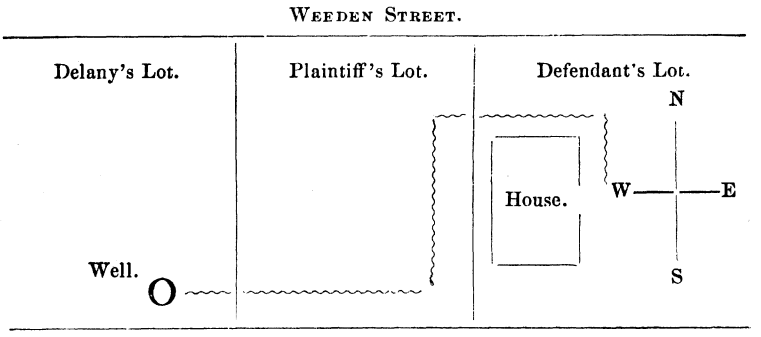
This was an action of trespass *quare clausum fregit*, to which the defendant pleaded in justification a right of way. The action was tried in the Court of Common Pleas to the court, and judgment rendered for the defendant. It came up to this court by bill of exceptions, the exceptions being accompanied by a statement of facts proved on the trial; in substance as follows:—

The plaintiff and the defendant were owners of adjoining lots fronting on Weeden street, in the former town of North Providence, now Pawtucket. The two lots were formerly part of a larger estate belonging to Michael Coyle. On the 11th May 1866, Coyle sold the part not covered by the two lots to P. G. Delany. On the part so sold there was a well. In the deed to Delany, Coyle reserved a right to use the well in the following words, viz.: "Excepting a privilege to the well of water on said lot, which I reserve for the use of my said homestead estate." The two lots now owned by the plaintiff and the defendant were embraced in what was then the "said homestead estate." Michael Coyle lived there after the sale till his death. He died after May 16th 1866, leaving a will bearing date of that day, which was approved November 5th 1866. In the will he devised the homestead estate to his wife for life, and, after her decease, to his son, John Coyle, and his

daughter, Mary Smith, the defendant, in fee simple, devising to John the tenement occupied by himself, with the lot of land westerly from the house, being the lot now owned by the plaintiff, and to Mary Smith the basement and attic tenements, with the share of land belonging to the same on the easterly side thereof, being the lot which she now owns. The widow of Michael Coyle died many years ago. The part of the homestead estate devised to John Coyle came to the plaintiff by mesne conveyances previous to June 17th 1872. The part devised to Mary Smith was in her possession June 17th 1872. The lot now owned by the plaintiff is nearest the land sold to Delany. A path leading from the defendant's lot to the well crosses the plaintiff's lot. The tenants and occupiers of all portions of the homestead house had, for some years (but not twenty years), both before and after the death of Michael Coyle, used the well, and the path to go to and from the well, when they saw fit. The plaintiff built a fence across the path on the line between his lot and the defendant's, and on the line between his lot and the Delany lot. On the 17th June 1872, the defendant removed the lengths of fence stretching across the path, as being obstructions to her right of way along the path to and from the well, this removal being the trespass complained of.

The statement showed, in addition to the facts above stated, that both parties could go to the well in another way, by first passing directly from their own lots into Weeden street, then down Weeden street to the Delany lot and across the Delany lot; but this way was not the accustomed way—was more burdensome to the Delany lot, and it was not known that the owners of the Delany lot would consent to its use.

The diagram represents the premises.



The wave line is the route taken by the defendant to the well.

Browne & Van Slyck, for plaintiff.

P. E. Tillinghast, for defendant.

The opinion of the court was delivered by

DURFEE, C. J.—The plaintiff contends that Michael Coyle, being the absolute owner of the estate, had the right to dispose of the lot which he now owns unencumbered by the way; that Michael did so dispose of it when he devised it to John Coyle in fee simple, and that under John Coyle he holds it unencumbered.

The defendant contends that by force of the reservation in the deed to Delany, the privilege of the well became appurtenant to the homestead estate and to every part of it, and consequently to the part which she now owns, and that inasmuch as she cannot use the privilege without the way, she is entitled to the way, either as a way of strict necessity, or as a way which, being reasonably necessary, may be implied from the circumstances.

1. We do not think the defendant is entitled to the way as a way of strict necessity. Ordinarily, such a way is implied as incident to an express grant upon the presumption that when a man grants a thing he intends likewise to grant that without which the thing granted cannot be enjoyed. The privilege of the well has not been expressly granted or devised. If it passed to the defendant it passed to her as appurtenant to the estate which was devised to her, and that, too, without any mention, even in the most general way, of appurtenances. Now it will not be denied that Michael Coyle had the power to devise the estate without the privilege. He might have done so in express terms. Or, again, he might have expressly devised the intervening lot unencumbered by the way, in which case the privilege, if dependent on the way, would be extinguished by implication. The devise of the intervening lot in fee simple was *primâ facie* equivalent to such a devise; for *primâ facie* it gave the devisee as perfect an estate as the devisor himself had, and the devisor himself had an estate so unencumbered.

2. Is the plaintiff entitled to the way as a way which, being reasonably necessary, may be implied from the circumstances of the estate?

The law in regard to the creation of easements by implication where estates which have been united in a single ownership are severed by deed, will, or partition, is elaborately discussed in the

third and last edition of Washburn on Easements and Servitudes, published in 1873. The cases there collected and collated are somewhat discordant, but they are very generally to the effect that where the easement or *quasi* easement is continuous, apparent, and reasonably necessary to the beneficial enjoyment of the estate for which it is claimed, a grant thereof will be implied. The rule applies especially in favor of easements of air and light, lateral support, partition walls, drains, aqueducts, conduits, and water-pipes or spouts, all these being continuous easements technically so called—that is to say, easements which are enjoyed without any active intervention of the party entitled to enjoy them. Ways are not in this sense continuous easements, but discontinuous or non-continuous, being enjoyed only as they are travelled. This distinction, however, between ways and the other easements mentioned has not been uniformly regarded, and there are cases, especially in Pennsylvania, in which it has been held that ways which are visibly and permanently established on one part of an estate for the benefit of another will, upon a severance of the estate, pass as implied or constructive easements appurtenant to the part of the estate for the benefit of which they were established: *Kieffer* v. *Imhoff*, 26 Penna. St. 438; *McCarty* v. *Kitchenman*, 47 Id. 239; *Phillips* v. *Phillips*, 48 Id. 178; *Pennsylvania Railroad Co.* v. *Jones*, 50 Id. 417; *Cannon* v. *Boyd*, 73 Id. 179; *Thompson et al.* v. *Miner*, 30 Iowa 386; *Huttemeier* v. *Albro*, 2 Bosw. 546; affirmed, 18 N. Y. 48. But in New Jersey the doctrine was held to be inapplicable to ways: *Fetters* v. *Humphreys et als.*, 19 N. J. Eq. 471. And there are many English cases in which the application of the doctrine to ways has been denied: *Pheysey et ux.* v. *Vicary*, 16 M. & W. 484; *Whalley* v. *Thompson et al.*, 1 Bos. & Pul. 371; *Worthington* v. *Gimson*, 2 El. & E. 618; *Dodd* v. *Burchell*, 1 H. & C. 113; *Polden* v. *Bastard*, 4 B. & S. 258, and affirmed, Law Rep. 1 Q. B. 156; *Thompson* v. *Waterlow*, Law Rep. 6 Eq. 36; *Langley et al.* v. *Hammond*, Law Rep. 3 Exch. 161; and see *Pearson* v. *Spencer*, 1 B. & S. 571, and affirmed, 3 B. & S. 761; *Daniel* v. *Anderson*, 31 L. J. N. S. 610, cited in Washburn on Easements, 3d ed. 59.

In *Dodd* v. *Burchell*, 1 H. & C. 113, the owner of an estate had conveyed a part of it upon which there was a way which he claimed to be entitled to by implied reservation, upon the ground that there had been a continuous user of it for a number of years,

and that without it the land retained could not be reasonably enjoyed. The Court of Exchequer decided against the claim. Chief Baron POLLOCK said: "There is a wide difference between that which is substantial, as a conduit or watercourse, and that which is of an incorporeal nature, as a right of way. In my opinion if we were to adopt the principle contended for, it would be a most dangerous innovation of modern times. The law seems to me particularly careful and anxious to avoid important rights to land being determined by parol evidence and the prejudices of a jury."

In *Worthington* v. *Gimson*, 2 El. & E. 618, Justice CROMPTON uses the following language: "It is said that this way passed as being an apparent and continuous easement. There may be a class of easements of that kind, such as the use of drains or sewers, as part of the necessary enjoyment of the severed property. But this way is not such an easement. It would be a dangerous innovation if the jury were allowed to be asked to say from the nature of a road whether the parties intended the right of using it to pass."

In *Polden* v. *Bastard*, 4 B. & S. 258, the owner of two adjoining estates devised them to different persons. There was on one of them a well and pump to which the tenant of the other was, when the will was made, and for some time before had been, in the habit of resorting for water, with the knowledge of the testatrix, using a foot-way from his dwelling house into the yard where the pump was. He had no supply of water on his own premises, but might have obtained it there by digging a well fifteen or twenty feet deep. The testatrix devised the premises "as now in the occupation" of the tenant. The devisee sold to the defendant, who claimed the right to use the pump. The claim was not sustained. ERLE, C. J., said: "There is a distinction between easements, such as a right of way or easements used from time to time, and easements of necessity or continuous easements. The laws recognise this distinction, and it is clear that upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner, by appropriate language, shows an intention that they should pass. The right to go to a well and take water is not a continuous easement, nor is it an easement of necessity."

We share the feeling expressed in these cases in regard to making rights in real estate dependent upon facts and circumstances which may be differently interpreted by different minds. If the grant of a way, existing previously *de facto*, can be implied from anything short of necessity, we think at any rate that the party claiming the way should be required either to show, as in *Pettingill* v. *Porter*, 8 Allen 1, that without the use of the way he will be subjected to what, considering the value of the granted estate, will be an excessive expense; or to show, as in *Thompson et al.* v. *Miner*, 30 Iowa 386, that there is a manifest and designed dependence of the granted estate upon the use of the way for its appropriate enjoyment, or to adduce some other indication equally conclusive; and see *Worthington* v. *Gimson*, 2 El. & E. 618; *Leonard* v. *Leonard*, 7 Allen 277, 283.

In the case at bar the legal grounds of the decision made in the court below are not explicitly stated, but only the decision itself, and the facts on which it was based. The question for us, as submitted to us in argument, is whether, the facts being as stated, the decision was right. We think it was not. It does not appear that the defendant's estate is dependent on the Delany well for its water supply, nor that the defendant has not a well of her own or could not make a well for herself at moderate cost. And in regard to the way, it does not appear to have been established in the lifetime of Michael Coyle so definitely as to show a *decision* on his part to subject the part of the estate now owned by the plaintiff to a *quasi* servitude in favor of the other part—as, for instance, he might have done by inclosing the way with a fence, which should connect it with the part now owned by the defendant. Indeed, we do not see that the case at bar differs materially from *Polden* v. *Bastard*, 4 B. & S. 258, above cited; for, as we have seen, the privilege of the well not having been expressly devised, we cannot infer the way from the privilege, but must rather presume an extinguishment of the privilege unless the way may be otherwise implied. If the facts are not such that the way may be otherwise implied, the *primâ facie* right of the plaintiff to have his estate unencumbered by the way must prevail. We think the way cannot properly be implied from the facts which are stated. We therefore sustain the exceptions and grant the plaintiff a new trial.

Exceptions sustained.

After reading the above opinion one is impressed with the thought that there is much to be said in favor of the decision of the court below. It might well

be argued that as the use of the well was reserved equally for the benefit of all portions of the "homestead estate" at the time of the sale to Delany and the testator, during his ownership of both sections of land, having impressed upon the portion owned by the plaintiff a *quasi* servitude or easement, for real servitude or easement, of course, could not be, the land servient and dominan belonging to the same person, and tha fact being presumably known to the devisees, the son and the daughter of the testator probably his heirs, the land would naturally pass to the devisees, with the respective portions charged and benefited, as they were in the testator's lifetime; unless something should appear in the devise, manifesting the intention of the testator to change the character of the enjoyment of the land; and that the devise in fee simple is not enough *per se* to manifest such intention since the enjoyment of an estate in fee simple is by no means inconsistent with its enjoyment subject to an easement, and as the will is to be taken as a whole and the intention of the testator collected therefrom (3 Burr. 1541, 1581; *Ruston* v. *Ruston*, 2 Dall. 244), if the devise to plaintiff's grantor "gave the devisee as perfect an estate as the devisor himself had and that was an estate so unencumbered;" so the devise to the defendant gave her "as perfect an estate as the devisor himself had" and that was an estate with the advantage of the use of the well annexed thereto and solemnly reserved to it, and that as to the use of the well the way, long used by the testator, was necessary, as no presumption could be raised that the owner of the Delany lot would permit a new and more burdensome way to be laid out upon his premises—as he certainly could not be compelled to—the way having been once located, the power of location was gone for ever, and in this case, the effect would be not merely to change the way but to create an additional and distinct one.

The English authorities seem to uphold the decision and to show a tendency to restrain ways by implication to those of strict necessity (though occasionally straining the word "necessity" and sometimes taking a more liberal view as to the character of the necessity), and by no means to favor the granting of ways by implication as original rights, or their revival after extinction by unity of possession, and, in view of the assumed non-continuous character of ways, not to apply to that species of easements the rule laid down in Gale on Easements 40. "Easements which are apparent and continuous are not merely those which *must* necessarily be seen, but those which *may* be seen or known on a careful inspection by a person ordinarily conversant with the subject."

In *Whalley* v. *Thompson*, 1 B. & P. 371 (1799), it was held that a way extinguished by unity of possession did not revive on severance. In *Plant* v. *James*, 5 B. & Ad. 794 (1833), Lord DENMAN said, "If the grantor wishes to revive or create such a right he must do it by express words or introduce the words therein used and enjoyed "in which case easements existing in point of fact though not existing in point of law would be transferred to a grantee."

In *Glave* v. *Harding*, 27 L. J. (N. S.) Exch. 286 (1858), Baron BRAMWELL appears to be disposed to apply a somewhat more liberal rule to ways and to grant that there might be such a thing as a continuous way. "It [a lease] did not grant the right in terms and the only way in which it could grant it was that the condition of the premises, at the time when the lease was granted, showed that it was intended that the right of way should be exercised on the principle I have adverted to, that by the devolution of the tene-

ments a right of way to a particular door or gate would, as an apparent or continuous easement, pass to the owners and occupiers of both of them. But I think that the way in question is not a continuous and apparent easement within the principle of law * * * I found my opinion upon the condition of the premises at the time the lease was granted."

In most of the English cases, there were other outlets besides the one claimed as a way by implication and as reasonably necessary, and therefore they do not exactly cover the point of the principal case; indeed in *Pheysey* v. *Vicary*, 16 M. & W. 484, it was doubted by ALDERSON, B., whether a new trial should not be granted to try whether the way claimed were not necessary to the *convenient* occupation of the house, although there was another outlet from the premises. In *Dodd* v. *Burchell*, there was an additional way.

Necessity has in some cases been given a more liberal interpretation. In *Pyer* v. *Carter*, 1 H. & N. 972, it was said that by necessity should be understood the necessity at the time of conveyance and as matters then stood without alteration. This case which was not that of a way, has run the gauntlet of criticism and it is questionable how far it is authority beyond its own facts. In *Ewart* v. *Cochrane*, 7 Jur. 925 (1861), Lord CAMPBELL said: "When two properties are possessed by the same owner, and there has been a severance made of part from the other, anything which was used and was necessary for a comfortable enjoyment of that part of the property which is granted shall be considered to follow from the grant, if there be the usual words of conveyance."

Polden v. *Bastard*, 4 B. & S. 258, does not materially differ from the principal case, except perhaps in the particular, that in the English case, there was evidence that water could be obtained on the premises of the defendant by digging a well of a certain depth, but this distinction can be easily resolved to a mere question of the burden of proof, which Chief Justice DURFEE thinks should rest upon the person claiming the easement

In the United States, in Massachusetts, in the case of *Pettingill* v. *Porter*, 8 Allen 1 (1869), it was left to the jury to say whether there would be unreasonable labor and expense in constructing another way, and in the Supreme Court, CHAPMAN, J., said: "The word 'necessity' cannot reasonably be held to be limited to physical necessity. If it were so, the way in question would not pass with the land if another way could be made by any amount of labor or by any possibility."

In *Fetters* v. *Humphrey*, 3 C. E. Green (Ch.) 262 (1867), ZABRISKIE, Ch., remarked, "If until the time of severance of title there has been a way, or drain, or other matter in the nature of an easement, from one of the parcels through the other, established and kept up by the common owner of both, and necessary for the beneficial enjoyment of the dominant parcel, then an easement is created by such sale, devise or partition. Discontinuous easements not constantly apparent are only continued or created when they are necessary, and that necessity cannot be obviated by a substitute constructed on or over the dominant premises."

In Pennsylvania, the doctrine, which seems based rather in legal refinement than on practical utility, that ways are not continuous easements, and that, therefore, the same rule as to visibility and permanency, is not to be applied to them as to other easements, is not regarded as law, and more liberality has been shown in sustaining ways than elsewhere. In *Kieffer* v. *Imhoff*, 2 Casey 438 (1856), the right to an alley-way

through the servient in favor of the dominant portion of land, which two portions had formerly belonged to one proprietor and had been sold at sheriff's sale, with no mention of the right of way, was sustained, although it was not a way of necessity. LEWIS, C. J., said, "It is obvious, therefore, that if the dominant and servient tenements become the property of the same owner, the exercise of the right, which in other cases would be the subject of an easement, is during the continuance of his ownership, one of the ordinary rights of property only, which he may vary or determine at pleasure. The inferior right of easement is merged in the higher title of ownership: 2 Bing. 83; 9 Moore 166; 3 Bulst. 340. * * * Upon a subsequent severance of the estate by alienation of part of it, the alienee becomes entitled to all continuous and apparent easements which have been used by the owner, during the unity of the estate and without which the enjoyment of the several portions could not be fully had. * * * The owner may, undoubtedly, alter the quality of the several parts of his heritage, and if he does so and afterwards alien one part, it is but reasonable that the alterations thus made, if palpable and manifest and obviously permanent in their nature, shall go to the purchaser in the condition in which they were placed and with the qualities attached to them by the previous owner." The learned judge also approved of the rules of the civil law with reference to servitudes and cited Pardessus, *Traite des Servitudes*, § 288, which (as given in Gale, p. 50) is "If afterwards these heritages should become the property of different owners, whether by alienation or division amongst his heirs, the service which the one derived from the other and which was simple 'destination *du pue de famille*,' as long as the heritages belonged to the same owner, becomes a servitude as soon as they pass into the hands of different proprietors."

In *Phillips* v. *Phillips*, 12 Wright 186 (1864), THOMPSON, J., said: "In this, although we do not recognise a way of necessity, we see the reason for the creation of this private way (*i. e.*, that it was the only convenient way), why it was opened, kept open and used by the owner and his family until his death, and the same condition of things, as regards the surroundings continuing, we may presume that it must have been the intention of the owner that it should remain permanent, inasmuch as he made a final disposition by will of both the dominant and servient portions, without the slightest hint of a wish that their relations to each other should be changed." It will be noticed that the court gave a different face to the devise in fee from that given by the Rhode Island court, and as its opinion is derived from a consideration of the whole will, it would seem to be in better accord with the usually received principles of interpretation.

Pennsylvania Railroad Co. v. *Jones*, 14 Wright 417 (1865), recognises and follows the foregoing case.

In *Overdeer* v. *Updegraff*, 19 P. F. Smith 119 (1871), which was the case of an alley-way, WILLIAMS, J., said: "But if there had been no express reservation of the right to the use of the alley in the conditions of sale, and in the deed delivered to the purchaser, the latter would have taken it subject to the servitude imposed upon it by the decedent for the use and benefit of the occupants of the adjoining lot. It was a continuous and apparent easement and the law is well settled that in such a case a purchaser, whether at private or judicial sale, takes the property subject to the easement."

In *Cannon* v. *Boyd*, 23 P. F. Smith 179 (1873), where an alley-way was claimed over a property which had been sold at sheriff's sale, on behalf of a property sold at the same sale, both properties having belonged to the same owner, LYND, J., in the District Court,

had charged: "The only question in this case is, what was the condition of these two properties at the time of the sheriff's sale? If the condition of the properties was such as to indicate that the occupants of property now owned by the plaintiff used the alley in question and had a right to do so, the verdict should be for the plaintiff." This was affirmed by the Supreme Court.

It will be seen by this short review of cases that there is a considerable conflict of authority, leading to no little uncertainty, but that on the whole it can hardly be said of ways by implication that they are favorites of the common law. H. B., Jr.

Supreme Court of Michigan.

JOHN HANCOCK MUTUAL LIFE INS. CO. *v.* MOORE, Adm'r of TODD.

A party cannot be compelled to accept his adversary's admission in lieu of affirmative evidence offered by himself.

Where a paper is admissible for one purpose, it does not become inadmissible because it cannot be used for another. Thus where an administrator sues on a life insurance policy, his letters of administration are admissible in proof of his representative character, although they are not in such case evidence of the death of the insured.

Though there is no presumption of death from the fact of disappearance until after seven years, yet a jury may infer death at an earlier date from circumstances or any other satisfactory evidence.

A clause in a policy of life insurance that the policy shall be void if the assured die by his own hand, is in the nature of a penalty or forfeiture, and the burden is on the insurers to show that it has been incurred.

Such forfeiture is not incurred by self-destruction while insane, and it makes no difference whether the language of the policy is "die by his own hand" or by "suicide." The terms are synonymous.

Where the jury find the fact of death of the assured, but in answer to special instructions to find whether or not he committed suicide, they return that they cannot say, this does not vitiate the verdict. A general verdict for the plaintiff would not be vitiated even by a finding that the assured committed suicide, unless the jury also find that it was voluntary.

Error to Wayne Circuit.

The suit below was on a life policy in favor of William Todd, who was claimed to be dead, but whose death was sought to be proved by his disappearance, aided by circumstantial testimony.

The defence relied on was, 1. That he was not shown to be dead; and 2. That if dead he died by his own act. The policy contained this clause: "3. That in case the person whose life is hereby insured shall die by his own hand," &c., "this policy shall be void, and the company shall not be liable for the loss."

Griffin and *Dickinson*, for plaintiff in error.